

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 24-cr-80103-AMC-1

UNITED STATES OF AMERICA, Fort Pierce, Florida

Plaintiff, February 28, 2025

vs.

10:02 a.m. - 11:12 a.m.

DUSTIN SEAN MCCABE,

Volume 5

Defendant. Pages 1 to 59

TRANSCRIPT OF JURY TRIAL - DAY 5
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

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STENOGRAPHICALLY REPORTED BY:

LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter to the
Honorable Aileen M. Cannon
United States District Court
Fort Pierce, Florida

1 (Call to the Order of the Court.)

2 THE COURT: Good morning. Let's get appearances,
3 please.

4 MR. KELLER: Good morning, Your Honor. Zachary Keller,
5 Tanner Stiehl, and Jacob Koffsky on behalf of the
6 United States.

7 THE COURT: One moment. Mr. O'Sullivan, are you on the
8 line?

9 MR. O'SULLIVAN: Good morning, Your Honor. May it
10 please the Court. Yes, I am.

11 THE COURT: All right. Please proceed to make your
12 appearance.

13 MR. O'SULLIVAN: Terrence O'Sullivan, appearing
14 remotely for Dustin Sean McCabe.

15 THE COURT: Okay. And you're on the telephone line.
16 Mr. McCabe is present in the courtroom.

17 And you may all be seated.

18 Do you know Ms. Francis's ETA?

19 MR. O'SULLIVAN: She -- the last I spoke with her, she
20 said that she was arriving at the courthouse area at 10:03. So
21 she should be present shortly.

22 THE COURT: Okay. Officer, can you see if Ms. Francis,
23 one of the attorneys, is downstairs in the lobby, please.

24 COURT SECURITY OFFICER: All right.

25 THE COURT: In the meantime, Mr. O'Sullivan, are you

1 prepared to proceed while we await Ms. Francis's arrival?

2 MR. O'SULLIVAN: Yes, Your Honor, I am.

3 THE COURT: Okay. All right then. We're here to
4 address two legal issues; that is, number 1, finalizing the
5 jury instructions which we covered partially yesterday and,
6 number 2, hear any appropriate motions now that the government
7 has rested.

8 So we'll start with the jury instruction issues because
9 I think they are important and will frame our Rule 29
10 discussion. With that, let me start with the government.

11 MR. KELLER: Yes, Your Honor.

12 And I understand from your minute order that we
13 reviewed this morning, that what we filed may not have been
14 what you were looking for. I have talked with Mr. O'Sullivan.
15 I think what we thought our task was, was to kind of give a
16 streamlined, simplified instruction. To respond to the order,
17 though, and this is one thing that when I filed these
18 instructions and verdict form was an oversight of mine, and I
19 want to explain the structural proposal that I had in the
20 original. So the way that this is structured, and I'm looking
21 at page 21.

22 THE COURT: One moment.

23 Mr. O'Sullivan, can you hear Mr. Keller perfectly?

24 MR. O'SULLIVAN: Yes, I can hear him loud and clear,
25 Your Honor. Thank you.

1 THE COURT: Okay. Thank you.

2 Please continue.

3 MR. KELLER: Yes, Your Honor.

4 And this is as to the jury instruction for seaman's
5 manslaughter that the government proposed, because Your Honor
6 noted that there are no --

7 THE COURT: You know what? I'm sorry to interrupt, but
8 I hear Ms. Francis is almost here, within seconds, so let's
9 just let her -- let's just wait for her full arrival so she can
10 absorb all of this information.

11 MR. KELLER: Yes, Your Honor.

12 MR. O'SULLIVAN: Your Honor, and I apologize for not
13 being there in person today.

14 THE COURT: That's okay. I am glad we were able to
15 accommodate your telephonic appearance, and Ms. Francis is
16 almost here.

17 MR. O'SULLIVAN: I appreciate that accommodation,
18 Your Honor.

19 (Pause in proceedings.)

20 THE COURT: Okay. Good morning, Ms. Francis. Please
21 make your appearance.

22 MS. FRANCIS: Good morning, Your Honor.
23 Calisha Francis on behalf of Mr. Dustin McCabe.

24 THE COURT: Okay. All right. Mr. O'Sullivan is on the
25 line telephonically. So he will take the lead with the

1 argument this morning. Mr. Keller was about to get started
2 describing the thought process behind the original proposal in
3 Count 1. So, Ms. Francis, why don't you gather your items.

4 MS. FRANCIS: Thank you, Judge.

5 MR. KELLER: I'm sorry. They -- Mr. Koffsky was going
6 to get a bottle of water for her. That's why --

7 THE COURT: Okay. Thank you.

8 MS. FRANCIS: Thank you.

9 THE COURT: Ms. Francis, while we wait, there was a
10 paperless order that I docketed this morning. You may not have
11 seen it because you were en route to the courthouse. So if you
12 can activate your computer or whatever it is that you do to see
13 orders, I would encourage you to do that so that we can all be
14 up to speed.

15 MS. FRANCIS: Yes, Your Honor.

16 THE COURT: Okay. I think we are all ready now to
17 proceed. Let's start again, Mr. Keller.

18 MR. KELLER: Yes, Your Honor. Thank you.

19 So the government used the *O'Keefe* jury instruction as
20 the conceptual framework for this proposed instruction. But
21 you're exactly right in your first question relating to this
22 statute, that it does have these two separate types of
23 positions that a person could be in. And I thought that part
24 of our conversation yesterday was this question you had about
25 whether these two descriptions of conduct effectively overlap

1 and -- you know, as far as how they're all negligence. And I
2 would agree with that. But the reason we proposed it, as we
3 did originally, is because the way it is written, it does have
4 kind of two separate descriptors.

5 THE COURT: Okay. So if you were to revert back to the
6 original formulation, that still leaves the issue of jury
7 unanimity. So that is an option, is to return to your
8 proposal, but then there would need to be, I think, some
9 additional language to ensure unanimity on that essential
10 element of the offense, or both.

11 MR. KELLER: And this is where I have my oversight,
12 which is this: The structure that I used for this was based
13 upon the jury instruction of the Eleventh Circuit, 35.4, which
14 is for a 924(c), "a use or carry in relation to," and then --
15 on the one hand, and then "possession in furtherance of" on the
16 other. So it has this same "or" structure for its second
17 element.

18 what I overlooked is the fact -- and I've prosecuted
19 these cases many times, so I should have realized or at least
20 taken note of and incorporate it here, that we do have a
21 special verdict form or a special finding as to that count with
22 respect to, on the one hand, the use or carry and then, on the
23 other, the possession.

24 So if we proceed this way, which I think is what we
25 should do based upon the information elicited at trial, the

1 facts of this case, which are different from any other seaman's
2 manslaughter I have been able to find, in the fact that
3 Mr. McCabe both was the owner/charterer and the Captain -- that
4 we would have a verdict form that in the same way as a 924(c)
5 that has those two subparts, would simply have an A and a B
6 that has language that tracks the two aspects of the third
7 element.

8 So it would be something to the effect of, number 1, as
9 a captain or pilot, the loss of life was proximately caused by,
10 and then the list of things, guilty, not guilty. And then B,
11 as an owner or charterer, the loss of life was proximately
12 caused by, and then the list of things that we have at the end
13 of the second "or."

14 THE COURT: And then what would you add to the
15 instructions themselves to direct the jury that they can check
16 one or both, but must be unanimous in either selection?

17 MR. KELLER: So, Judge, as far as -- at least in the
18 924(c), 35.4, I don't think there is anything that says that to
19 the jury. I think it's that -- the "what does that work," if
20 you will, is the fact that on the one hand, there is the
21 subpart to the third element, and then they make the special
22 finding. So they're all going to be checking, we, unanimously
23 agree, A, that as captain or pilot, guilty, not guilty;
24 unanimously agree, B, as an owner -- or as an owner or
25 charterer. And then the list goes -- or then the list of the

1 rest of it goes on. So they're all unanimously finding --

2 THE COURT: So you don't think there needs to be
3 anything in the body of the instructions themselves that
4 emphasizes the need to be unanimous on the particular elemental
5 subpart? It just strikes me that there would be, essentially,
6 nothing there for the jury to be guided by on unanimity,
7 leaving only that unanimous reference in the verdict form
8 itself.

9 MR. KELLER: So I don't think it -- it would not be
10 error for Your Honor to include something like that, if that's
11 what you want to do, saying you can unanimously find one, the
12 other, or both. But I'm just saying that when it comes to the
13 924(c) instruction as I saw it, I don't think there is anything
14 in there that directly is on point about that. But I think
15 that would be totally fine if there were language that said
16 they could find one, the other, or both, but that they must be
17 unanimous about at least one.

18 THE COURT: Okay. All right. Let me hear from
19 Mr. O'Sullivan on this issue. What basically we've arrived at,
20 I think, is a request by the government to return to its
21 original proposal, but add a special interrogatory to define
22 the third element in two parts, and then potentially add
23 additional language in the instruction requiring the jury to be
24 unanimous on one or both.

25 what are your thoughts, Mr. O'Sullivan?

1 MR. O'SULLIVAN: Your Honor, after reading your
2 paperless order that was filed this morning, I agree that the
3 way that we have proposed those -- the new jury selection [sic]
4 is probably incorrect. Looking at the exact language in
5 18 U.S.C. 1115, there seems to be different adjectives or
6 modifiers used as it pertains to a captain with his misconduct,
7 negligence or inattention to duty. And then there seems to be
8 a different modifier for the owner, which is fraud, neglect,
9 connivance, misconduct, or violation of the law. So I think
10 combining those, as we did in the proposed jury instructions,
11 is likely incorrect.

12 I do agree with the Court's analysis that the jury
13 needs to be guided as far as unanimity -- being unanimous as to
14 each element of each part or subpart of every crime alleged.
15 So I think that me and Mr. Keller need to work on doing another
16 joint proposal that is going to be very clear to the jury that
17 they have to be unanimous as to each element.

18 THE COURT: Okay. All right then. So what do the
19 parties wish to do at this point? I think there is agreement
20 on the concept and agreement on the law that guides the
21 concept, but perhaps some additional conferral is necessary
22 just to finalize the exact words in the proposal.

23 Mr. Keller.

24 MR. KELLER: And specifically, the -- a sentence at the
25 end of some kind that articulates that they can -- they must be

1 unanimous about either the first part of 3, the second part of
2 3, or both, and as they will see on the verdict form, something
3 like that.

4 THE COURT: Yes. And then the actual proposal of the
5 special verdict form. So I haven't seen that yet.

6 MR. KELLER: Yes, Your Honor, we will include that.

7 THE COURT: Okay. All right, then, Mr. O'Sullivan,
8 when we're complete with today's legal arguments, then you all
9 will have the afternoon to put that together. And I don't need
10 to see that until at some point tomorrow, Saturday. So you
11 have some leeway there to submit it, but no later than Saturday
12 evening, which would be March 1, at --

13 MR. O'SULLIVAN: Yes, Your Honor.

14 THE COURT: -- 6:00 p.m.

15 MR. O'SULLIVAN: Understood, Your Honor.

16 THE COURT: Okay. All right.

17 Ms. Francis, do you wish to chime in at all on this?

18 MS. FRANCIS: I agree with what Mr. O'Sullivan said
19 about it, Your Honor.

20 THE COURT: Okay then. All right. Then let's shift
21 gears to the Rule 29.

22 Mr. O'Sullivan.

23 Oh, actually, before we do that, are there any other
24 items to address with respect to the jury instructions,
25 Mr. Keller?

1 MR. KELLER: No, Your Honor, I don't believe so.

2 Mr. Koffsky is just raising that you took the
3 regulations issue under advisement. I don't know that
4 that's -- you know, if that's for another time.

5 THE COURT: Okay. I haven't made a final decision on
6 that, but I will advise the parties on Monday morning. I think
7 I'm ultimately inclined to remove the particular notice
8 regulation from the instructions themselves and require the
9 government to rely on the record evidence for that particular
10 alleged violation of law. So I won't be ruling on that issue
11 today, but you will see final language from the Court on
12 Monday.

13 MR. KELLER: Yes, Your Honor.

14 THE COURT: Okay. All right. Let's hear from
15 Mr. O'Sullivan now on any Rule 29 motion.

16 MR. O'SULLIVAN: Okay, Judge, at this point, the
17 defense would, pursuant to Federal Rule of Criminal Procedure
18 29, ask the Court to dismiss Counts 1 through 5 of the
19 indictment.

20 The legal standard is that, under Rule 29, a judgment
21 of acquittal should be granted if the evidence presented by the
22 prosecution is insufficient to sustain a conviction. The
23 standard is that the Court must consider whether viewing the
24 evidence in the light most favorable to the prosecution, any
25 rational trier of fact could find the essential elements of the

1 crime beyond a reasonable doubt.

2 Generally, Judge, the defense would argue with
3 specifics to the absence of the vessel, to wit, the Southern
4 Comfort. The vessel, which is essential to the prosecution's
5 case, is currently now and was currently during all material
6 times unavailable for inspection.

7 Mr. McCabe was never put on notice that he was being
8 investigated, which deprived him of an opportunity to
9 independently have an unbiased third party do a mechanical
10 survey of the entire boat. The government had the opportunity
11 on March 29th of 2020 to seize the vessel and to perform any
12 types of tests or inspections that they wanted to.
13 Officer Fowler testified that it was Sunday night, it was after
14 5:00 p.m., and marinas were closed, which, I think that
15 argument doesn't hold any weight. If a crime was committed, it
16 doesn't matter what time of day it is. But the government had
17 the opportunity to seize the vessel.

18 Up to that point, testimony was that Mr. McCabe was
19 completely cooperative with all authorities, including Fish and
20 wildlife, including North Palm Beach, and including
21 Coast Guard.

22 Even if Mr. McCabe was not cooperative, there was
23 certainly the opportunity for any of these investigative
24 agencies to secure a warrant, seize the vessel, and inspect the
25 boat. That -- the results of that could have been provided to

1 a jury for them to see exactly, again, from an independent
2 third party or government inspection, what was happening with
3 the boat, what was happening with the engine throttles, what
4 was happening with the levers, what was happening with the
5 cables. The jury was deprived of that. And we argue that
6 that's a major lack of evidence. That's a major insufficiency
7 of evidence.

8 Furthermore, as it relates to Count 1, there was no
9 direct evidence that the boat, quote/unquote, "slipped into
10 drive," whether it be reverse or forward, or was accidentally
11 put into drive by the captain or owner, Mr. McCabe.

12 On direct testimony -- I'm sorry. On cross-examination
13 Jennifer Hester admitted that the spear gun could have been
14 bent by the rudder and/or the keel as opposed to the props on
15 March 28, 2020.

16 To further support that, Kimberly K. Odom testified
17 inconsistently in 2020, making the statement that a wave caused
18 Mollie Ghiz-Flynn to, quote, "wash off the dive platform."
19 That would negate any possible negligence coming from
20 Captain McCabe.

21 As far as Count 2 of the false statements charges --

22 THE COURT: Let's just now focus on -- let's stop there
23 so that I can --

24 MR. O'SULLIVAN: Yes, ma'am.

25 THE COURT: -- address the arguments count by count.

1 All right.

2 MR. O'SULLIVAN: Yes, ma'am.

3 THE COURT: Mr. Stiehl.

4 MR. STIEHL: Thank you, Your Honor.

5 And as I begin my arguments as to this count, I just
6 want to reiterate the point that Terrence brought up.

7 THE COURT: One moment. It's "Mr. O'Sullivan." And
8 please bring the microphone closer to you.

9 MR. STIEHL: My apologies, Your Honor. Mr. O'Sullivan.

10 The point that Mr. O'Sullivan brought up that, for the
11 purposes of this motion, the Court must look at the facts in
12 the light most favorable to the prosecution. So first to
13 address sort of some of the arguments that he brought up, the
14 most recent thing about the wave washing her over. As the
15 captain of the vessel, it remains his responsibility and his
16 duty to take into account all weather and other such things
17 that are in the nature of dealing with the ocean.

18 To go into some of the arguments that I have, as far as
19 the first element is concerned, the defense stipulated to it,
20 so we won't get into that. But the element is that the
21 defendant was an owner, charterer, captain, engineer, or pilot.
22 So that was the stipulation. We don't need to get into that.

23 The second element is that a person lost his or her
24 life. And as far as that concerned, we had Dr. Tops --

25 THE COURT: It's okay. I think it's undisputed that

1 Ms. Mollie Ghiz-Flynn died, unfortunately. So let's just focus
2 on the arguments raised by Mr. O'Sullivan.

3 He has discussed the unavailability of the vessel. He
4 has discussed being deprived of an opportunity to conduct a
5 mechanical survey. He has referenced the government's ability
6 to seize the vessel but decision not to. He has referenced
7 Mr. McCabe's cooperation on the date in question. And he has
8 classified all of that as, I quote, "a major insufficiency of
9 evidence." He has also made a reference to the lack of
10 purported direct evidence regarding the boat randomly engaging
11 in a forward or reverse direction.

12 So those are the arguments I have been presented on the
13 motion, and that's what I would like for you to focus on,
14 please.

15 MR. STIEHL: Okay. Thank you, Your Honor.

16 I think that the government has provided sufficient
17 evidence, keeping in mind that the standard here --

18 THE COURT: Okay. Why? Why is there sufficient
19 evidence to clear the Rule 29 hurdle?

20 MR. STIEHL: Because the standard is negligence,
21 Your Honor.

22 THE COURT: Uh-huh.

23 MR. STIEHL: So the government doesn't have to provide
24 specific -- Mr. Keller, do you -- and -- okay.

25 So, Your Honor, while the United States contends the

1 defendant's modification of the vessel's throttles was the most
2 likely cause of the engine irregularities, any inaction or
3 action by him is sufficient to meet this negligence standard.

4 Jennifer Hester was explicit in telling the defendant
5 about the multiple issues that occurred with his propulsion
6 system, and he did not take sufficient actions to correct them.

7 The United States has also proven the defendant
8 violated the Coast Guard's reporting regulations as the owner
9 and in his role as the operator of the vessel. Based on the
10 testimony from Jennifer Hester, Kay Odom, Jordan McKenna, and
11 Officer Abramczyk, a propulsion irregularity occurred on
12 March 28th, a loss of steering, and a grounding. And then, as
13 was stated by Chris Mosquera, Allan Roth, Sean Goodman, and
14 Lieutenant Commander Cole, those casualties were reportable to
15 the Coast Guard. And as stated by Sean Goodman and
16 Chris Mosquera, those casualties were not reported to the
17 Coast Guard.

18 The Coast Guard, if they would have been reported,
19 likely would have intervened and prevented this from ever
20 happening in the first place, based on the testimony from
21 Sean Goodman, Chris Mosquera, and Andrew Cole talking -- or
22 Lieutenant Commander Cole talking about the Coast Guard's
23 typical processes when receiving those types of reports.

24 The United States has also proven that the defendant
25 failed to warn the victim, Mollie Ghiz-Flynn, on the danger

1 that he was aware of based on the malfunctions from the
2 previous day. In fact, Sean Flynn and David Anderson even said
3 that he intentionally made a comment about not giving a safety
4 brief, the defendant; which Lieutenant Commander Cole stated
5 was always an industry standard when it comes to diving,
6 regardless of the Coast Guard's separate requirements.

7 And as the captain of the vessel, he had a duty to tell
8 Mollie, Sean, and David, that there was a risk based on these
9 propulsion irregularities and grounding that occurred on the
10 day before. And -- and, again, that's based on the standards
11 mentioned by Lieutenant Commander Cole and Allan Roth.

12 And then I also wanted to raise the point, if the jury
13 believed that he failed to put the vessel in neutral or just
14 backed over the victim, like Mr. O'Sullivan had said, they
15 didn't provide any direct evidence whether or exactly how that
16 may have happened. And as the captain, as the person at the
17 helm of the vessel, the government has provided ample
18 responsibility that it is his duty in that position of the
19 captain of the vessel to ensure the safety of the passengers of
20 the vessel.

21 So just by the nature of his position, any action of
22 the engaging of that propeller is -- ultimately falls on the
23 responsibility of the defendant, Mr. McCabe, as the owner and
24 as the captain of this vessel.

25 And, again, I wanted to bring up one more point. So

1 the government doesn't have any responsibility to provide the
2 direct evidence of why this occurred. I think the government
3 provided a -- from Mr. Fowler why the vessel wasn't seized on
4 that day; and that was because the defendant didn't tell
5 investigators at that time or the day before, as he should
6 have, about that casualty. And if the government would have
7 known about that, then that would have more further guided the
8 investigation at that point on March 29th.

9 And something that I don't want to get forgotten, in
10 these five years this was also the height of COVID. So
11 Mr. O'Sullivan had kind of indicated, well, maybe he could have
12 found a hotel, maybe he could have found somewhere else to
13 stay. This was, you know -- again, we didn't talk about it in
14 front of the jury because of your previous order, but
15 everything was shut down. Everything was crazy at that point
16 in time. Who is to say that they wouldn't have been putting
17 Mr. McCabe out on the streets, again, at 6:00 p.m. on a Sunday,
18 when the world was shut down? So I just think that's another
19 point that I don't want to get lost in all of this.

20 And, again, if he would have notified them, the
21 Coast Guard or the FWC, about the prior day's incident, that
22 would have helped them understand that this likely was an issue
23 caused by the vessel, but they just didn't have that
24 information at that time.

25 THE COURT: All right. I just want to say one small

1 point about the motion in limine. The Court restricted the
2 government from presenting evidence that Mr. McCabe violated a
3 specific ordinance, barring the operation of commercial -- or
4 excuse me -- recreational -- I think I'm probably mixing it up
5 at this point. But it was -- it was a state or municipal order
6 barring operation of his vessel during COVID. But that did not
7 preclude the government from mentioning the existence of COVID
8 kind of as a general reality at that time for purposes of this
9 alleged lack of investigation or seizure of the vessel.

10 Anything further, Mr. Stiehl, you wish to add in
11 response to Mr. O'Sullivan's point about the Rule 29 on
12 Count 1?

13 MR. STIEHL: I think we just presented a lot of
14 witnesses, more than half a dozen, that testified
15 circumstantially about all of the other things that went into
16 that. And a specific mechanical survey is not necessary, based
17 on -- again, Allan Roth testified about the survey before the
18 vessel was bought. And the other witnesses testified, like,
19 what exactly was happening with the vessel the day before. And
20 then again you heard from the witnesses, Andrew Cole and
21 Allan Roth, about the standards that were required. And then
22 you heard from Chris Mosquera about the specific -- sort of how
23 the investigation went in the coming days and weeks, in that,
24 you know, he didn't hear from Jennifer Hester until days later
25 about that accident. And by that point, the condition of the

1 vessel had already been changed.

2 And Fowler also mentioned that -- Investigator Fowler
3 mentioned that in his testimony, that, you know, the priority
4 was trying to save Jennifer -- or Mollie Ghiz-Flynn's life.
5 And so, you know, maybe there was a scenario where a better
6 investigation could have been done, but then, you know -- they
7 were trying to save her life.

8 THE COURT: Okay. I think I understand your argument.
9 Mr. O'Sullivan, any rebuttal on this particular count?

10 MR. O'SULLIVAN: Just briefly, Judge.

11 As far as the COVID argument goes, if a crime was
12 committed, I have not seen where the government is going to
13 make an accommodation to a defendant and say, Hey, you don't
14 have a hotel for tonight, so we're not going to properly
15 investigate.

16 I think that argument doesn't hold water. A death
17 occurred. It's obvious that it occurred on the boat. The
18 government had several agencies there at the Riviera Beach
19 Marina. They could have and should have seized that boat that
20 day, and it does not matter where Mr. McCabe goes. He can
21 sleep on the streets. He can go to his home. He can get a
22 hotel. You know, law enforcement does not give accommodations
23 to defendants where they're going to go that night.

24 They could have and should have seized the boat. That
25 is a substantial piece of evidence in this case, if not the

1 biggest piece of evidence in this case, and they've failed to
2 do so.

3 And again, I would just say that that is insufficiency
4 of evidence presented on the government's part. And they had
5 adequate multiple agencies on scene who were equipped to do so.

6 THE COURT: Okay. Thank you.

7 All right. With respect to the motion on Count 1, I'm
8 going to deny the motion. The standard, as the parties are
9 aware, requires the Court to construe all reasonable inferences
10 in favor of the government and inquire whether any reasonable
11 juror could find the defendant guilty on Count 1 beyond a
12 reasonable doubt. I think there is more than sufficient
13 evidence to submit the count to the jury for its consideration.
14 All of the arguments you have raised, Mr. O'Sullivan,
15 ultimately go to the weight of the evidence and in a manner
16 that doesn't warrant a Rule 29 grant.

17 You can certainly argue to the jury that there was a
18 shoddy investigation, if you think that's what it is, and you
19 can characterize it in argument based on the evidence. But
20 ultimately, there was, I think, a significant amount of
21 evidence on the negligence prong and the neglect of duties,
22 including from Ms. Hester, through her message to the defendant
23 that he -- or that the propeller was engaging through the
24 events of the 28th. That certainly put him on notice of a
25 steering propulsion problem. He ultimately failed to warn his

1 customers of that issue, or at least a reasonable juror could
2 conclude as much. And so, although there wasn't ultimately a
3 formal mechanical survey done of the propulsion mechanism
4 doesn't mean that a juror couldn't conclude he acted
5 negligently in his operation of the vessel and his duties on
6 the vessel.

7 I would also note, and I agree with the government on
8 this point, that he never notified the Coast Guard of what had
9 occurred on the 28th, which would have put the Coast Guard on
10 alert with respect to any deficiencies on the vehicle.

11 Yesterday, too, we had a witness who testified that she
12 recommended to Mr. McCabe that he communicate or seek the
13 assistance of a Coast Guard engineer on-site, which, no
14 evidence indicates he took her up on that suggestion.

15 And so, ultimately, although I think you're correct
16 that you can argue this absence of the specific mechanical
17 survey, it's nowhere close to grant a Rule 29 motion on
18 Count 1.

19 So let's turn to Count 2. Mr. O'Sullivan.

20 MR. O'SULLIVAN: Judge, as it relates to Count 2 -- let
21 me just get my -- on Count 2, which is false statement within
22 the jurisdiction of an agency of the United States, which is
23 codified at 18 U.S.C. 100(a)(2), my argument on this count is
24 just very brief, Your Honor.

25 The government introduced forms used to fill out the

1 purpose of the vessel. Taking a close look at those forms,
2 these forms lack any specific instructions as to what boxes
3 should be checked, and they used some obtuse words such as
4 "coastwise" and other words which are outside the normal
5 language that a layman would know. I would argue that these
6 forms are, per se, confusing.

7 There was no evidence that Mr. McCabe employed an
8 attorney or otherwise some type of expert to help fill out this
9 form, such as a business consultant or something along those
10 lines.

11 And, finally, Judge, I would offer to the Court and
12 argue that there was no evidence presented in the government's
13 case in chief that Dustin Sean McCabe had any specific intent
14 to try to deceive the Coast Guard or any other official with
15 regards to his filling out of these forms.

16 THE COURT: Okay. Mr. Stiehl, can you point me to the
17 exhibit number with a certificate of occupation -- I think it's
18 called. Or I'm sure I'm saying it wrong. Whatever the
19 certificate is called.

20 MR. STIEHL: Your Honor, I believe it's 77,
21 Government's Exhibit 77.

22 THE COURT: Okay. So let me just understand.
23 Mr. O'Sullivan, you're arguing that the Certificate of
24 Documentation at Government's Exhibit 77 is, per se, confusing?
25 Is that the document you're asking me to look at?

1 MR. O'SULLIVAN: Yes, Your Honor.

2 THE COURT: Okay. Let me hear from the government on
3 this.

4 MR. STIEHL: Your Honor, I think the first point I want
5 to make is that Mr. O'Sullivan's points are really points to be
6 made in close to the jury. If he wants to make these arguments
7 to the jury, I think he will have the ability to make those
8 arguments.

9 I think from the perspective of the government,
10 Mr. McCabe is -- or the defendant is a licensed Captain who has
11 been operating commercial scuba vessels since 2014.

12 Sandra Brammeier stated that this is the type of
13 knowledge that someone in his position would know. And I would
14 also like to point out the specific warning that's right above
15 the signature block. And it specifically has an 18 U.S.C. 1001
16 warning. So in that case, Mr. McCabe was put on notice that
17 false statements made on this form could be criminal violations
18 of 18 U.S.C. 1001. And we went over that part of the form with
19 Ms. Walker.

20 And the prior vessel, again, I think as stated by
21 Kristy Kelly, his prior vessel the Sea Scout, was an inspected
22 vessel. So, you know, he would have --

23 THE COURT: Did she testify to that?

24 MR. STIEHL: Yes.

25 THE COURT: Okay.

1 MR. STIEHL: And again, that's circumstantial evidence
2 that he was on notice of what the word "recreational" meant in
3 the context of this form. And I think Mr. Steven Poznak and
4 Kristy Kelly amongst -- Kristy Kelly stated that he wanted the
5 vessel to be inspected. But several of the witnesses,
6 including Mr. Poznak and Kristy Kelly, explained that
7 the -- his entire point for all of this was to be operating as
8 a business and be using this for coastwise purposes.

9 THE COURT: Okay. So if this had been done properly,
10 what would have been checked -- it would have been -- would
11 have been just "coastwise" or would have been "recreational"
12 and "coastwise"? What -- in the government's view, what would
13 have been the correct way to fill this form out?

14 MR. STIEHL: So it would have been -- I think another
15 point which came in through, I believe it was Mr. Goodman -- or
16 no, it was Mr. Anderson's testimony -- is that it was -- like,
17 he specifically said it's only for recreational, and I know
18 we -- we didn't -- like the ban, the travel or the --

19 THE COURT: I'm sorry. I just want to make sure that
20 your answer is clear.

21 My question is, how would this have been filled out in
22 the government's view correctly in light of the facts and
23 circumstances? Just looking at the form, what would have been
24 checked?

25 MR. STIEHL: Coastwise, recreational, and fishery. But

1 coastwise is the -- this important one.

2 My point about David Anderson was, if they intended to
3 commercially fish, they would also need to have that fishery
4 endorsement.

5 THE COURT: Okay. Let's assume no commercial fishing.
6 I don't think there has been any evidence of any commercial
7 fishing going on.

8 So assuming he wanted to do the six-pack vessel with
9 the luxury scuba charters to the Bahamas with food, drinks,
10 et cetera, with paying customers, what would you check?

11 MR. STIEHL: Coastwise. Yeah, and in the block below,
12 it would be "passenger, six or fewer."

13 THE COURT: Okay. I think I understand your -- okay.

14 All right. Mr. O'Sullivan, any additional argument on
15 Count 2?

16 MR. O'SULLIVAN: Just briefly to rebut what the
17 government said is, those definitions are highly technical. I
18 don't think anyone knows what "coastwise" means. And in order
19 to be more accurate, that form should have had definitions as
20 to: what does recreational mean? what does commercial mean?
21 And what does coastwise mean? Otherwise, I would stand on my
22 previous arguments, Your Honor.

23 THE COURT: Mr. Keller, to be clear, this is the basis
24 of Count 2, this document?

25 MR. KELLER: Exhibit 77, which -- and the reason for

1 that is that it's the document that he actually signs under
2 penalty of perjury to have that Certificate of Documentation
3 issued.

4 THE COURT: Okay. All right. I think although I
5 understand your arguments, they're fair arguments,
6 Mr. O'Sullivan, that you should raise to the jury, but I don't
7 think they ultimately warrant a conclusion that no reasonable
8 juror could conclude that Mr. McCabe acted willfully when he
9 filled out this form in a false way knowing that what he was
10 checking was false.

11 we're talking, at the end of the day, about an
12 experienced captain who has been around the scuba industry for
13 many, many years at that point. And I think a reasonable juror
14 drawing inferences in favor of the government could very much
15 conclude that he knowingly lied on this form to evade
16 inspection. And certainly his plans for the vessel were
17 commercial in nature, to make money through scuba charters.
18 And so, to check the box "recreational only," I think is
19 reasonably to be viewed as highly inconsistent with that entire
20 business model. So for those reasons, I will deny the Rule 29
21 on Count 2.

22 Let's now address the wire fraud counts,
23 Mr. O'Sullivan.

24 MR. O'SULLIVAN: Thank you, Your Honor.

25 And because Counts 3 through 5 are all similar in

1 nature, my argument with pertain to Count 3, 4, and 5 together.

2 The defense would argue that the government failed to
3 show how much of the PPP loan was used for payroll versus
4 covered operational expenses. There was testimony that covered
5 operational expenses could include rent, interest, utilities,
6 et cetera. We heard from Althea Harris who was the SBA
7 specialist, and she testified that 60 percent of that loan
8 would have to be used for payroll, and up to 40 percent could
9 be used for expenses.

10 Yesterday, we heard from Captain Sandra Brammeier, and
11 she testified to the expenses associated with running a scuba
12 boat. She testified, you know, personally, as to her boat, how
13 much her note was, how much her slip rent was. And she
14 testified, I believe, to, at a minimum, \$250 a month just for
15 basic maintenance. That does not include other expenses, such
16 as, you know, replacing a battery, making other repairs,
17 repairing bilge pumps and, of course, fuel which is a giant
18 expense in the scuba industry.

19 So the government could have but failed to, you know,
20 talk about how much of this was used for payroll versus
21 expenses. And also I forgot to add insurance; that could be
22 covered as an operational expense which is also a very, very
23 big expense which Captain Brammeier touched on. She had a
24 similar boat and she testified to that.

25 Additionally, the government had access to Mr. McCabe's

1 bank records, and they only went back so far as 2019 --

2 THE COURT: But isn't that when the business account
3 was created? I don't understand that argument. They can't
4 make up records that don't exist.

5 MR. O'SULLIVAN: He used different banks, and they
6 didn't properly investigate to see if he used a different bank
7 prior to 2019, that they selectively picked only a couple of
8 banks. He had several bank accounts, and they only picked a
9 few.

10 THE COURT: So going further back would have done what
11 in your view?

12 MR. O'SULLIVAN: It would have shown a pattern of
13 payroll and expense history. Mr. McCabe had a TVA account
14 since 2014, but we're missing those five years. The reason
15 that the bank account switched in 2019, according to
16 Kristy Kelly's testimony, was that they were separated and
17 divorced. She was dissolved as a partner or a secretary, I
18 should say, in the business. So he -- when she was removed
19 from the Articles of Incorporation, he switched banks so that
20 she wouldn't have access to the bank anymore.

21 The government easily could have known that, especially
22 after interviewing Ms. Kelly, and they could have went back to
23 his other business records, including the Sea Scout, and seen a
24 pattern of payroll and seen a pattern of expenses, but they
25 didn't.

1 THE COURT: Let me understand, when you say "pattern of
2 payroll," payroll to who?

3 MR. O'SULLIVAN: Well, that's the question, Your Honor.
4 we don't know who was on the payroll because the government
5 never provided that testimony.

6 THE COURT: Well, there was an exhibit that listed
7 people who worked there who were terminated. There was
8 testimony that none of these people were officially on the
9 payroll and that got paid through tips, if they got paid.

10 So I'm -- I just want to clarify, when you draw this
11 distinction between payroll and covered operational expenses,
12 are you referring to the defendant's payroll for himself or
13 something else?

14 MR. O'SULLIVAN: Well, certainly there was his payroll.
15 He is entitled to a payroll as the owner of the company. And
16 the question remains, was his wife, who was also the secretary
17 and registered agent, now ex-wife, Kristy Kelly, was she
18 receiving payroll as well? we don't know that. And that
19 factors into the 60/40 equation.

20 The government's theory is that he took all this money
21 and used it for himself personally. But we lack any evidence
22 that was presented in the government's case-in-chief as to
23 where these moneys went to.

24 THE COURT: Okay. Thank you. All right. Let me hear
25 from the government.

1 MR. O'SULLIVAN: Judge, may I still give a little more
2 argument?

3 THE COURT: Oh, yes. Sorry, I didn't mean to cut you
4 off. I thought you were completed.

5 MR. O'SULLIVAN: Thank you, Your Honor.

6 I just wanted to talk -- the government made a feature
7 of Agent Caleb King's testimony, this whole PGA National thing.
8 And I would kind of just incorporate, you know, my previous
9 arguments that there were other bank accounts that Mr. McCabe
10 had. There was also other streams of income. There was
11 testimony that he sold his previous boat, the Sea Scout, for
12 67,500 in cash. So that was a, you know, big cash infusion.

13 we don't know if funds from that cash infusion was used
14 to pay for the PGA membership or not. That was left very
15 unclear. I believe that Agent King admitted that he did not
16 subpoena all of Mr. McCabe's bank statements. The defense
17 would argue that he had the power, the access to do so.

18 And, finally, Your Honor, my last argument as to
19 Counts 3 through 5 revolve around Kristy Kelly,
20 Captain McCabe's ex-wife. I would argue that her testimony
21 should be given little, if any, weight. She claimed to be the
22 bookkeeper for the business, but she could not answer a single
23 basic question about any payroll or any expense. She could not
24 answer a question as to how many customers they had at any
25 given month, not even an average, not even an estimation. She

1 didn't know how much the boat note was or mortgage. She didn't
2 know how much the slip fee was. She basically knew nothing
3 about the books, but claimed to be the bookkeeper. She also
4 testified that due to an unfortunate accident, she was
5 bedridden from 2015 to 2017. So at that point, of course, she
6 was not doing the books.

7 You know, additionally, I would argue that any
8 testimony that the Court gives weight to to be viewed as biased
9 given the nature of their relationship as it pertains to, you
10 know, the separation and the divorce which was close in times
11 to the events that we're talking about.

12 THE COURT: Okay.

13 MR. O'SULLIVAN: And that would conclude my argument
14 for Counts 3 through 5, Your Honor.

15 THE COURT: Okay. Thank you. Let me hear from the
16 government. I would like you to please focus in, starting with
17 Count 3, the documents that pertain to Count 3 with exhibit
18 number references, and then explaining the government's
19 position for the particular false and fraudulent statements
20 that are in those particular documents. So let's be precise
21 here, going count by count.

22 MR. STIEHL: Thank you, Your Honor. We're going to
23 pull up the count real quick here.

24 Count 3 is based on Government's Exhibit 91, which was
25 filed, again, on February 2, 2021. On page 3, it has the date,

1 and this was the --

2 THE COURT: Microphone, please. You can move it if you
3 want to kind of work with Mr. Keller, but I do need you to
4 speak into the microphone.

5 MR. STIEHL: So, Your Honor, the first thing I want to
6 point out is the average monthly payroll that's listed. It's
7 listed as 8,154.

8 THE COURT: Okay. One moment. Let me go to this
9 exhibit, which is Government's 91. Okay. This is the Cross
10 River application that was submitted on February 2 of 2021, and
11 signed by Mr. McCabe. It lists average monthly payroll as
12 \$8,154, multiplied by the 2.5 multiplier permitted by the SBA
13 program, leading to a loan amount of \$20,385. Okay. What's
14 your argument, Counselor?

15 MR. STIEHL: Yes, Your Honor.

16 So the first point I want to make is that Mr. McCabe's
17 business had been shut down functionally since the date of the
18 incident. You heard that from numerous witnesses. Of note, in
19 Mr. -- a text to Mr. Goodman, he says that the business is shut
20 down. The business was formally shut down by the Coast Guard
21 on April 9th or 10th, I believe. So --

22 THE COURT: But by "business" -- there was some
23 argument about, well, it's not the business, it's the vessel.
24 The Port Order only applies to the vessel.

25 what do you say about that?

1 MR. STIEHL: I say that the business was -- it was
2 Florida Scuba Charters. The business was the vessel. That's
3 what all of the evidence said.

4 we heard from multiple witnesses that said, you know,
5 Mr. McCabe wasn't operating any other businesses in that time
6 period, related to the scuba industry. And the business is
7 Florida Scuba Charters.

8 THE COURT: Okay. So there is testimony that it was
9 shut down following the tragedy, both via the port order
10 referencing the vessel, along with Mr. McCabe's own words to
11 Mr. Goodman, I think it is, using the words "shut down," and
12 then other testimony from various other witnesses who said they
13 did not observe or see Mr. McCabe engage in any scuba charters
14 after the March 29 date.

15 MR. STIEHL: Yes, Your Honor, and I also want to bring
16 up the fraudulent tax documents which were provided with this
17 application. That's in Government's Exhibit 93.

18 THE COURT: And so this is -- this is an income tax
19 return with the year 2020, that is filled out but was never
20 filed with the IRS, correct, per the stipulation?

21 MR. STIEHL: Yes, Your Honor.

22 THE COURT: And the stipulation is what exhibit?

23 MR. STIEHL: Oh, Exhibit 122.

24 THE COURT: Okay.

25 Okay. So just looking here at the documents that

1 pertain to Count 3, what is exactly false and fraudulent in
2 this loan application?

3 MR. STIEHL: First off, the average monthly payroll,
4 which has been escalating through the course of the three
5 applications, it's been getting higher. When you look at the
6 original application --

7 THE COURT: Well, I'm just looking at the first one
8 now.

9 MR. STIEHL: But going -- so this application was the
10 third application. He wasn't charged for the first two
11 applications. The first application, the one that was hand
12 filled out, which was brought in yesterday through Mr. Steib,
13 that amount was lower. The second application, he wasn't
14 charged for because, you know, the government made a
15 determination -- yeah --

16 THE COURT: Okay. Mr. Keller, I think it might be
17 easier, rather than trying to get kind of this hybrid approach,
18 to just have you finish off any additional argument on Count 3.
19 And then I will hear from Mr. O'Sullivan if there is anything
20 else.

21 MR. KELLER: Yes, Your Honor.

22 So the point that Mr. Stiehl is making is just that in
23 the context of this business being shut down, that what's
24 significant about this 8100 number in light of these other
25 numbers is the fact that somehow the payroll keeps going up,

1 even though all the evidence is that this business has been
2 shut down. Even if the defense wants to claim -- even if you
3 wanted to believe that Mr. McCabe somehow still limped along on
4 this business, despite not having his vessel. For this \$8,100
5 figure, it makes no sense that he would be somehow making more
6 money than -- later than he was before.

7 The other point I want to bring up, Judge, with respect
8 to this payroll number is that Ms. Kelly, who testified about
9 the business, as she ran it all the way up to 2019, which is
10 where these figures are supposed to be coming from, testified
11 that not only -- that they have no payroll, that they never
12 made anything like the kind of money that they're claiming, and
13 that she has no idea where this number would have come from.

14 So our position as to the payroll figure is that a
15 rational jury could easily find that this number is a fiction,
16 that it's something that Mr. McCabe made up. And something I
17 will highlight about this payroll figure, Your Honor, is that
18 it's incredibly significant. In fact, it's the most important
19 single number in these PPP applications because it determines
20 how much money Mr. McCabe could get. But he filled out these
21 earlier -- this earlier application with 7,500, he only made 18
22 grand, and he said, I want to make a little more than that. So
23 he bumped it up to \$8,100 per month so that he could get the
24 \$20,385.

25 So that is the first item in this application that we

1 submit the jury could easily find to have been a total fiction.
2 And it's material because of the fact that it sets how much
3 money he was able to take from the government.

4 The next thing we would highlight in Government's
5 Exhibit 91 is the gross receipts figure that's on page 1 as to
6 Government's Exhibit -- I'm sorry -- that, yes, that's on
7 page 4 of Government's Exhibit 91, but the first page -- or
8 page 3, rather, but the first page of the PPP application,
9 gross receipts of \$68,400.

10 You heard Ms. Kelly testify because she was working for
11 the company. She was keeping the books in the third quarter of
12 2019. And we asked, "Did y'all have anything like the gross
13 receipts from 68 thou- -- or \$68,400?" And she said,
14 "Absolutely not for a quarter."

15 And on redirect, she explained as to Mr. O'Sullivan's
16 point about her knowledge of the nuances, she couldn't tell
17 what the payroll was because there was no payroll. She
18 testified there was no payroll, so she couldn't possibly have
19 had that information.

20 And as to how many customers they had, what she
21 explained on redirect is that she didn't keep track of those
22 types of figures, just like in her current job where she is
23 doing the same type of work, it's worth noting, which just
24 speaks to her credibility, that she doesn't know the number of
25 customers there either. But what she could say for certain --

1 and this goes back to the tax forms I was showing her -- is
2 that if they would have had the kind of income like this, they
3 would have owed taxes on it, and she would have remembered
4 paying taxes on that kind of figure.

5 THE COURT: Okay.

6 MR. KELLER: And so that's the next thing that is
7 false.

8 The next item, Judge, turning the page to the second
9 page of the PPP application, which is where Mr. McCabe initials
10 several times, these are items where the defendant is
11 representing -- and this goes to the point about permanent
12 closure. The first set of initials is that the defendant has,
13 quote, "not permanently closed." And we submit that a rational
14 jury could easily find that that was false.

15 And then, second -- and this is the following one --
16 that he's swearing that the economic uncertainty makes this
17 loan request necessary to support ongoing operations of this.
18 we submit that what we showed is the defendant was writing
19 checks to cash for himself, and he was writing checks to the
20 PGA for this specific PPP application, and that that had no
21 connection to this business.

22 One thing I will highlight to Your Honor, which I
23 didn't point out with Special Agent King but probably should
24 have, is there is this whole argument that Mr. McCabe was a
25 golf pro at the PGA course. But consider the fact that he

1 listed his business, Florida Scuba Charters, on that
2 application which is Government's Exhibit 111. And when it
3 said what is the nature of this business, he just wrote,
4 "Charter." He didn't write, "I'm a golf pro"; he didn't write,
5 "I'm going to be giving golf instructions at this golf course,"
6 which, if he were actually going to, as the defense was trying
7 to suggest through their cross-examination, clearly, he would
8 have. So --

9 THE COURT: Okay. Thank you. All right.

10 with respect to Count 3, I think a rational juror could
11 conclude that Mr. McCabe committed substantive wire fraud by
12 making false and fraudulent statements on Government's
13 Exhibit 91 for many of the reasons identified by the
14 government.

15 And so, Mr. O'Sullivan, although you can take issue
16 with the credibility or worthiness of Ms. Kelly's testimony,
17 for example, those aren't a reason to take the question from
18 the jury all together. I think the figures on the form that
19 bear little to no resemblance to any payroll of the business,
20 the fact that it was shut down following the accident, is all,
21 in the collective, enough to clear the Rule 29.

22 And although you have potentially some arguments about
23 him engaging in other activities, ultimately, it's not enough
24 to persuade the Court that a rational juror couldn't find guilt
25 on Count 3.

1 Let me hear from the government on Counts 4 and 5. And
2 then I will hear from Mr. O'Sullivan if there is any additional
3 argument on those particular counts.

4 MR. KELLER: Yes, Judge.

5 And with respect to Counts 4 and 5, those I want to
6 highlight are the forgiveness applications, which, in essence,
7 are what makes these loans free money. So he gets the loans at
8 sub-rates from the loan itself, and then these are what make it
9 free money for him.

10 THE COURT: Okay. The exhibit numbers for these two?

11 MR. KELLER: Yes, Your Honor.

12 So the first is going to be Government's Exhibit 87,
13 which is Count 4.

14 THE COURT: Okay.

15 MR. KELLER: The second is Government's Exhibit 98,
16 which is as to Count 5.

17 THE COURT: Okay.

18 MR. KELLER: And the first thing that I will highlight
19 in terms of the things that are untrue in this -- in both of
20 these applications, is I want to direct your attention to where
21 Mr. McCabe wrote that he had five employees at the time of the
22 loan application, and five employees at the time of the
23 forgiveness application. And these were things that are -- and
24 we pointed out during direct examination this first one, that
25 the employees at time of loan application is false, that it

1 doesn't even match the applications that he filed in the first
2 place.

3 One thing I did not highlight in my direct that I just
4 wanted to point out this in evidence as to the second.
5 Employees at time of forgiveness application. And this is
6 something we will be pointing out in closing, is that
7 Mr. McCabe in both of these, both forgiveness applications,
8 says five employees at the time of this application. Which,
9 the witnesses explained the number of employees is important
10 because the whole point of all of this is to keep people
11 employed. And this is in Government's Exhibits 102 and 103
12 that we discussed with Caleb King -- at least 103 we've
13 discussed with Caleb King.

14 So Mr. McCabe dissolved Florida Scuba Charters on
15 May 13 of 2021. And why that date is significant is that
16 Mr. McCabe dissolved the company on May 13th, and then the very
17 following day he submitted this loan forgiveness application
18 for Government's Exhibit 87, which is Count 4, in which he
19 claimed -- he swore that he had five employees at the time of
20 this application, which couldn't possibly be true because of
21 the fact that he had just dissolved the company the day before.

22 THE COURT: Okay. And next alleged false or fraudulent
23 statement?

24 MR. KELLER: The next is going to be the amount that he
25 claims to have spent on payroll costs. And this is,

1 essentially, the same argument that I made before as to the
2 second PPP loan application.

3 The defendant simply didn't have any payroll. That is
4 what the evidence is that's been presented so far. Maybe he
5 will testify different. But under the standard here, drawing
6 all inferences in our favor, there is easily enough to
7 conclude, number 1, that this amount of payroll that he claims
8 to be paying is a total fabrication; and number 2, that he
9 shouldn't have gotten this money in the first place.

10 And that leads me to my next point as to what is false
11 in this application. And one of the reasons we often charge
12 the forgiveness applications in addition to the fact that it is
13 what makes it free money, which is itself a compelling fact,
14 is, the first thing that Mr. McCabe initials next to on this
15 application form where it says, "The borrower has complied with
16 all requirements," and then goes on to --

17 THE COURT: which document are you looking at?

18 MR. KELLER: Oh, I'm sorry. So -- and this is true of
19 both of these documents. But looking at Government's
20 Exhibit 87 -- and this is immediately under where it says "By
21 signing below, you make the following representations."

22 THE COURT: Yes, I see that.

23 MR. KELLER: And so that first initial where it says,
24 "The borrower has complied with all requirements," he is
25 re-swearing to all the things that came into getting this money

1 from the Paycheck Protection Program in the first place.

2 THE COURT: Okay.

3 MR. KELLER: So to the extent that there were
4 falsehoods in the initial application, so too, would he be, by
5 re-swearing those, be having those incorporated here. So we
6 would assert that the same falsehoods, the fake tax documents,
7 the fake statements of payroll, are all carried in here and
8 apply, and because of that, this defendant lied in order to get
9 this free money.

10 THE COURT: In terms of the applications, whether for
11 the money initially or forgiveness that came attached with the
12 tax returns that were never submitted, I know Count 3
13 referenced one such tax return. For Counts 4 and 5, where do
14 the tax returns fit in? And which exhibit numbers are those?

15 MR. KELLER: So the tax returns remain the same
16 exhibits, which are numbers -- 93 goes to the second loan. And
17 then -- oh, and 121 goes to the first loan. 121, Government's
18 Exhibit 121, being the Schedule C.

19 THE COURT: Okay. All right.

20 Okay. Mr. O'Sullivan, any other argument on your
21 Rule 29 with respect to the wire fraud, Counts 4 and 5?

22 MR. O'SULLIVAN: Just very briefly, Judge. While the
23 business was dissolved in May of 2021 and the forgiveness
24 application was filed subsequent, the basis of the forgiveness
25 goes back in time to when the loan was originated. So it

1 doesn't matter that the business was dissolved. The loan was
2 taken and used during the time that the business was open.

3 THE COURT: Okay. How do you deal with the fact that
4 this form, document Exhibit 87, states that Mr. McCabe at
5 Florida Scuba Charters had five employees at the time of
6 forgiveness? There is, I think, no basis to believe that
7 that's true under any circumstance; correct?

8 MR. O'SULLIVAN: Judge, I would make no argument as to
9 that point.

10 THE COURT: Okay. So at the very least, there is a
11 false and fraudulent statement with respect to the number of
12 employees at the time of forgiveness?

13 MR. O'SULLIVAN: Well, Judge, I would say to you that I
14 don't want to make any admissions on that as to the defendant.

15 THE COURT: Okay, then.

16 For the reasons stated by the government with respect
17 to Counts 4 and 5, a rational jury could conclude that
18 Mr. McCabe committed the offenses of wire fraud for the reasons
19 stated, given the testimony and the exhibits that have been
20 referenced. I don't think additional reasoning is necessary,
21 given the parties' lengthy argument. But suffice to say that
22 there is ample evidence in the record on all five counts in the
23 indictment and no basis to grant a Rule 29 to deprive the jury
24 of its consideration of those counts.

25 So having resolved the defense's Rule 29 motion, is

1 there anything else to take up today, Mr. Keller?

2 MR. KELLER: No, Your Honor.

3 THE COURT: Mr. O'Sullivan?

4 MR. O'SULLIVAN: Nothing from the defense, Your Honor.

5 THE COURT: Okay then. So let's cover a couple more
6 things before we adjourn for the day.

7 How much time, Mr. Keller, are you seeking for closing?

8 MR. KELLER: 75 minutes, Your Honor, total between
9 the -- split between the open/close and the rebuttal.

10 THE COURT: Mr. O'Sullivan, how much time would you
11 like, or Ms. Francis?

12 MR. O'SULLIVAN: I would like 90 minutes, Your Honor.

13 THE COURT: 90 minutes.

14 Okay. All right then. To be generous, since we have
15 moved fast, I will accommodate the 90-minute request, and that,
16 of course, applies to both sides.

17 Obviously, I know, Mr. O'Sullivan, you need to confer
18 with your client regarding his potential testimony. So I trust
19 that will take place over the weekend. We will be resuming
20 trial at 11:30 a.m. on Monday. Everyone must be here in
21 person. Please submit the final revision of the instruction
22 for Count 1 after conferral by tomorrow, Saturday, March 1, at
23 6:00 p.m. And then I will transmit, for the parties' physical
24 review, a final copy of the instructions on Monday at some
25 point before arguments.

1 My practice is to do the instructions prior to closing,
2 so you will have those if you choose to use them in your
3 argument.

4 Anything else, Mr. O'Sullivan?

5 MR. O'SULLIVAN: No, Judge, but thank you for allowing
6 me to appear remote today.

7 THE COURT: Okay. It's by phone, but thank you.

8 And, Mr. Keller?

9 MR. KELLER: Just about to ask. I know the Court is --
10 that the jury is back at 11:30. What time do you want us here?

11 THE COURT: I have hearings all morning. So 11:15.

12 MR. KELLER: Okay. Yes, Your Honor.

13 THE COURT: Thank you. And have a good weekend. And
14 everybody, get some rest, if you can.

15 That's all for today.

16 (These proceedings concluded at 11:12 a.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate
transcription of the proceedings in the above-entitled matter.

DATE: 05-07-2025

/s/Laura Melton
LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter
United States District Court
Southern District of Florida
Fort Pierce, Florida

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